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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 302

BARBARA C. FINE AND NANTUCKET EXPRESS LINES, INC.,
PETITIONERS,
v.
WOODS HOLE, MARTHA'S VINEYARD & NANTUCKET STEAMSHIP AUTHORITY, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, AND JOHN J. McCARTHY, AS HE IS COMMISSIONER OF ADMINISTRATION OF THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT WOODS HOLE, MARTHA'S VINEYARD & NANTUCKET STEAMSHIP AUTHORITY IN OPPOSITION

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The Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, respondent herein, respectfully sub-

mits the following in opposition to the Petition for a Writ of Certiorari filed June 30, 1966.

Questions Presented

Is petitioner estopped from challenging the validity of a statute, and the exercise of a power conferred by the statute, where it has benefited therefrom?

Is alleged competitive injury a basis for standing?

Have petitioners suffered legal injury?

Statement

The petition for writ of certiorari in *Nantucket Express Lines, Inc.* v. *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority,* No. 1270, October Term, 1965, which was filed on May 2, 1966, and denied three weeks later on May 23, 1966, involved the same matter that is involved in this case.

Petitioner Nantucket Express Lines, Inc. (hereinafter "petitioner") owns a vessel—the "Martha's Vineyard"—the operation of which was enjoined in 1959 in *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority* v. *Island Steamship Lines, Inc. et al,* Bristol Superior Court, In Equity, No. 5764.[1] Operation of the vessel was enjoined as a violation of Massachusetts Acts of 1948, c. 544, § 6, which provided as follows:

> "While any bonds issued by the Authority remain unpaid, no person shall operate a vessel of more than one hundred tons gross tonnage to carry by water passengers or freight between the mainland of the commonwealth and the islands of Martha's Vineyard

[1] The injunction is Appendix A hereto.

and Nantucket, and the Authority shall be entitled to receive injunctive relief against such operation.'"[2]

Since then, numerous suits have been brought against the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority or the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (which was created by Massachusetts Acts of 1960, c. 701, as successor to the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority) in an effort to vacate or nullify the injunction.

In No. 1270, in which the petition for writ of certiorari was denied, the decision of the Massachusetts Supreme Judicial Court was that the injunction could not be set aside, and prior litigation was *res judicata. Nantucket Express Lines, Inc.* v. *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority,* 1966 Mass. Adv. Sh. 139.

Here, petitioner seeks to accomplish the same result by indirection. The Authority had given petitioner a license to operate, and the injunction was modified to permit operations pursuant to the license. Petitioner seeks in this suit to challenge the constitutionality and exercise of the licensing power by the Authority, in order to avoid payment of a license fee and nullify the statutory limitation upon competition. The decision of the Supreme Judicial Court was that (1) petitioner was complaining of competitive injury, which was not a basis for standing; (2) petitioner did not suffer legal injury; and (3) petitioner was

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[2] Massachusetts Acts of 1960, c. 701, § 5, revised the limitation as follows:

"Except as provided in this act no person shall operate a vessel of more than one hundred gross tons for the carriage of passengers, vehicles or freight for hire by water between the mainland of the commonwealth and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing so to do by the Authority."

estopped to "question the validity of (a) the license which it accepted and to which it agreed, or (b) the statute which authorized the license, thus affording to Lines various benefits." (Petition, p. 9).

Argument

I. The Same Relief Was Sought in No. 1270, Where the Petition For Writ of Certiorari Was Denied.

No. 1270, and this case, are part and parcel of the same effort to evade or avoid the limitation upon competition with respondent—a public transportation agency—successively contained in Massachusetts Acts of 1948, c. 544, § 6, and Massachusetts Acts of 1960, c. 701, § 5.

As previously shown, operation of petitioner's vessel the "Martha's Vineyard" was enjoined in 1959 as violative of state law.

No. 1270 was a frontal attack upon the injunction, which failed. The Massachusetts Supreme Judicial Court held that the suit was barred by *res judicata*, and this Court denied the petition for writ of certiorari.

This suit seeks to accomplish the same result by an attack upon the underlying statute. Petitioner's theory is that the statute is unconstitutional, and if this argument prevails, then presumably the outstanding injunction would be nullified.

But petitioner cannot achieve indirectly what it could not achieve directly. If a frontal attack upon the injunction is barred by *res judicata*, surely an attack upon the underlying statute is similarly barred.

Accordingly, this petition too should be denied.

II. The Decision Is Based Upon An Independent Non-Federal Ground.

Plainly, the decision below has, as one of its grounds, a separate and independent ground of state law—estoppel. Just as the decision in No. 1270 was based upon *res judicata*, so here, the decision is based upon estoppel, arising from the acceptance of benefits under the license and the attempt to challenge its validity to avoid compliance with its terms. Both are adequate, and completely independent, non-federal grounds, and accordingly, certiorari should be denied here, as it was denied in No. 1270.

III. The Decision of the Court Below Is Clearly Correct.

It is well established that, at common law, competitive injury is not a basis for standing.[3] This is established state and federal law. E.g., *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 138; *Associated Industries* v. *Ickes*, 134 F.2d 694, 700-701; *Nantucket Boat Inc.* v. *Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 345 Mass. 551; *Springfield Hotel Association, Inc. v. Alcoholic Beverages Control Commission*, 338 Mass. 699, 703; *Colantuoni* v. *Selectmen of Belmont*, 326 Mass. 778, 779; *Circle Lounge & Grill, Inc.* v. *Board of Appeal of Boston*, 324 Mass. 427, 429-430; *Walker* v. *Cronin*, 107 Mass. 555, 564.

It is also clear *under state law* that, having accepted and operated under the license, without which it could not operate, petitioner cannot challenge the validity of the license. It is well established *state law* that a licensee may

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[3] A different problem is presented under statutes which accord persons aggrieved or adversely affected the right to judicial review. Compare, e.g., *Federal Communications Commission* v. *Saunders*, 309 U.S. 470.

not attack the validity of the license to recover fees previously paid therefor. E.g., *Brown* v. *Nahant*, 213 Mass. 271; *Taber* v. *New Bedford*, 177 Mass. 197; *Emery* v. *Lowell*, 127 Mass. 138; *Cook* v. *Boston*, 9 Allen 393. By analogy, a licensee may not challenge the validity of a license to avoid the payment of fees due thereunder. Similarly, a tenant in undisturbed possession may not question his lessor's title, e.g., *Connolly* v. *Kilcourse*, 285 Mass. 398; a corporation which accepts a charter containing certain limitations may not complain of the unconstitutionality of those limitations, e.g., *Opinion of the Justices*, 251 Mass. 569, 612; *Rockport Water Co.* v. *Rockport*, 161 Mass. 279; and one who accepts benefits under a statute cannot challenge its constitutionality, e.g., *Commissioner of Banks* v. *Prudential Trust Co.*, 242 Mass. 78, 88; *Eustis* v. *Bolles*, 146 Mass. 413, 416, 417; *Hellen* v. *Medford*, 188 Mass. 42, 46-47. So, here, petitioner has accepted the benefits of the license, and it may not be heard to challenge the validity of the license. Petitioner had a choice. It could have entered into the license agreement, and operated the vessel—or declined to enter into the agreement, and not operated the vessel. Having entered into the agreement, petitioner must comply with its terms. Petitioner cannot have it both ways; that is, operate under the protection of the agreement, and at the same time urge its invalidity and decline to comply with one of its essential terms.

Finally, it is well established that one cannot challenge the constitutionality of a statute unless his rights are impaired thereby. There is no legal injury. E.g., *Massachusetts* v. *Mellon*, 262 U.S. 447. As this Court there stated:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when

the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." (262 U.S. at 488-489).

IV. The Decision Has No Significance for This Court.

The decision of the Court below is of no moment for this Court for several reasons.

First of all, if the license which petitioner challenges is invalid, either because the statute conferring the power is unconstitutional, or because the power was invalidly exer-

cised, petitioner is still subject to the injunction entered in 1959 which the Massachusetts Supreme Judicial Court refused to vacate in *Nantucket Express Lines, Inc.* v. *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 1966 Mass. Adv. Sh. 139, cert. den., No. 1270, October Term, 1965.

Secondly, the expiration date of the license which petitioner challenges has long since passed. The term of the license ended in September, 1965 (Petitioner's Appeal, p. 30), and therefore, the fancy issues of constitutionality which petitioner purports to raise have no continuing practical significance. The only practical effect of a decision would be to enable petitioner to avoid payment of the license fee. The suit is in essence one for money damages, which hardly merits the time and attention of this Court.

It is commonplace for public transportation agencies such as metropolitan transportation authorities to be protected against competition, and any claim that statutory provisions according such protection are unconstitutional is outdated.[4]

Moreover, the arguments of unconstitutionality could have been, and were, made in the case in 1959 in which petitioner was enjoined, and also in numerous previous cases to set aside or nullify the injunction. The same arguments were even made to this Court in No. 1270. The essence of petitioner's argument here is the same as it was in No. 1270, namely, that the statutory restriction upon competition formerly in Massachusetts Acts of 1948, c. 544,

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[4] The claim of interference with interstate commerce is specious. Supposedly, 4% of petitioner's passengers are in interstate commerce. *Nantucket Express Lines, Inc. Common Carrier Application*, Interstate Commerce Commission, Common Carrier Application, No. 1215 (Sub-No. 1), Application, filed September 15, 1965, p. 11. The amount of such traffic is infinitesimal, and moreover, petitioner does not have authority from the Interstate Commerce Commission.

§ 6, and now in Massachusetts Acts of 1960, c. 701, § 5, is unconstitutional. The same argument cannot be made here in a different guise.

Nor are these issues before the Court at this time. The court below decided the case on grounds of standing and estoppel only.

Furthermore, in this case, the parties entered into a stipulation which excluded federal issues raised in the petition. The stipulation carefully excluded issues as to the validity of the injunction and the constitutionality of the restriction on competition.[5] These issues were left to No. 1270, where they were barred by *res judicata*. This case was limited to questions of the constitutionality and exercise of the licensing power, neither of which merits the attention of this Court. Whether the licensing power was validly exercised does not seem to be a question of federal law in any event, and certainly it is not a question of importance meriting the attention of this Court. Similarly, the claim of unconstitutionality based upon the inadequacy of the statutory standard of "necessary or desirable to serve the purposes of this Act" (Mass. Acts of 1960, c. 701, § 5), is specious. The standard is comparable to the accepted standard in federal statutes of public convenience and necessity. The constitutionality of such standards is well established, and the question is hardly one which warrants the scrutiny of this Court.

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[5] The stipulation is Appendix B hereto. (Petitioner's Appeal, pp. 21-22).

Conclusion

For the reasons stated, the petition should be denied.

Respectfully submitted,

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Appendix A

COMMONWEALTH OF MASSACHUSETTS

Bristol, ss. Superior Court
In Equity
No. [5764]

NEW BEDFORD, WOODS HOLE,
MARTHA'S VINEYARD AND
NANTUCKET STEAMSHIP AUTHORITY,
PLAINTIFF

v.

ISLAND STEAMSHIP LINES, INC., *et als.*,
DEFENDANTS

FINAL DECREE

This cause came on to be further heard and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, Adjudged and Decreed that:

1. While any bonds issued by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority pursuant to the provisions of chapter 544 of the Acts of 1948 remain unpaid, the defendants, Island Steamship Lines, Inc. and Nantucket Express Lines, Inc., and their respective officers, agents and servants hereby are, and each of them hereby is, permanently enjoined from operating the vessel "MARTHA'S VINEYARD" to carry by water passengers or freight between the mainland of the Commonwealth of Massachusetts and Nantucket.

2. While any bonds issued by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority pursuant to the provision of chapter 544 of the Acts of 1948 remain unpaid, the defendants, Nantucket Express Lines, Inc., and Island Service Co., and their respective officers, servants and agents, and the respondent Joseph T. Gelinas and his servants and agents, hereby are,

and each of them hereby is, permanently enjoined from giving the vessel "MARTHA'S VINEYARD" wharf and/or berthing space to operate and carry by water passengers or freight between the mainland of the Commonwealth of Massachusetts and Nantucket.

3. While any bonds issued by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority pursuant to the provisions of chapter 544 of the Acts of 1948 remain unpaid, the defendant Joseph T. Gelinas, and his agents and servants hereby are, and each of them hereby is, permanently enjoined from causing the defendants Island Steamship Lines, Inc. and/or the Nantucket Express Lines, Inc. to operate the vessel "MARTHA'S VINEYARD", and from causing the defendant Nantucket Express Lines, Inc. to give said vessel wharf and/or berthing space, to carry by water passengers or freight between the mainland of the Commonwealth of Massachusetts and Nantucket.

4. While any bonds issued by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority pursuant to the provisions of chapter 544 of the Acts of 1948 remain unpaid, the respondent Carl A. Dahlberg and his servants and agents hereby are, and each of them hereby is, permanently enjoined from acting as captain and/or pilot of the vessel "MARTHA'S VINEYARD" and from permitting others to operate said vessel, to carry by water passengers or freight between the mainland of the Commonwealth of Massachusetts and Nantucket.

By the Court (s) (FAIRHURST, J.)

Entered July 28, 1959

(s) ALBERT HENNEBERRY
Asst Clerk

Entered in Clerks Office July 30 1959

(s) DOUGLAS C. LAW
Asst Clerk

Appendix B

THE COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court
In Equity
No. 28048

BARBARA C. FINE, ET AL

v.

WOODS HOLE, MARTHA'S VINEYARD and NANTUCKET STEAMSHIP AUTHORITY, ET AL

Stipulation

It is stipulated and agreed that the following issues will not be adjudicated by any decree which may be entered in the above matter:

(1) The vitality of the decree entered in the case of *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority* v. *Island Steamship Lines, Inc., et al,* Bristol County Superior Court, In Equity, No. 5764, and whether the proceedings and decision in that case are res adjudicata, collateral estoppel or estoppel by judgment on the constitutionality of the 100 gross ton limitation clause as set forth in Section 5, C. 701, Acts of 1960, since a bill of review is pending before the Supreme Judicial Court on said issues in the case of *Nantucket Express Lines, Inc.* v. *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority,* Bristol County Superior Court, In Equity, No. 7461;

(2) The constitutionality of the 100 gross ton limitation clause as set forth in Section 5, C. 701, Acts of 1960, in view of the said Bristol Superior Court case, In Equity, No. 7461, as distinguished from the constitutionality, interpretation and application of the provision therein as to the power of the Steamship Authority to license or permit

in writing the operation of a vessel of more than 100 gross tons, which are in issue; and

(3) The allegation of "a threat of contempt" as set forth in paragraph 15 of substitute bill in equity for a declaratory decree, without prejudice.

It is also stipulated and agreed that the defendant Woods Hole, Martha's Vineyard and Nantucket Steamship Authority withdraws its counterclaim without prejudice.

The facts are as set forth in the offers of proof.

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Attorney for Respondent
Steamship Authority

Filed August 9, 1965.